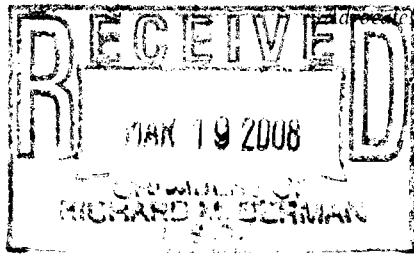
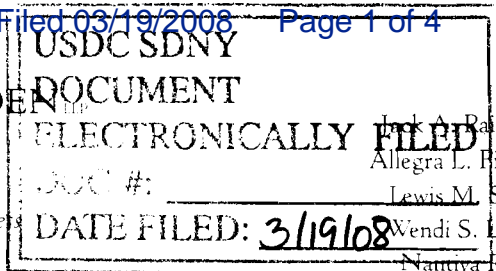


Wayne N. Outten
 Anne Golden
 Adam T. Klein
 Laurence S. Moy
 Gary Phelan
 Kathleen Peratis
 Piper Hoffman
 Justin M. Swartz

OUTTEN & GOLDEN



for Workplace Fairness

March 18, 2008

Jack A. Balsner
 Allegra L. Fishel
 Lewis M. Steel
 Wendi S. Lazar
 Nandya Ruan
 Deborah L. McKenna
 René S. Roupinian

By Hand Delivery

Honorable Richard M. Berman
 United States District Court for the Southern District of New York
 United States Courthouse
 500 Pearl Street, Room 650
 New York, New York 10007-1312

MEMO ENDORSED
 p4

Rachel M. Bien
 Cara E. Greene
 Mark R. Humowiecki
 Carmelyn P. Malalis
 Stephanie M. Marnin
 Tammy Marzigliano
 Ossai Miazad
 ReNika C. Moore
 Linda A. Neilan
 Tara Lai Quinlan
 Anjana Samant

Re: Diaz v. Scores Holding Co., No. 07 Civ. 8718 (RMB) (THK)

Dear Judge Berman:

We represent Plaintiffs and the putative class in the above-captioned matter. We write to request (1) permission to file a motion pursuant to Rules 12(d) and 56(f) of the Federal Rules of Civil Procedure; (2) permission to file a short sur-reply in further opposition to Defendants' summary judgment motion (docket number 23); and (3) permission to file a motion to strike the declaration of John Neilson (docket number 40).

Rule 12(d) and 56(f) motion

On February 1, 2008, at the very beginning of the discovery period, Defendants moved for summary judgment on Plaintiffs' joint employment / integrated enterprise allegations, a fact-intensive issue on which Defendants had not produced a single document, and on which Plaintiffs had already served extensive discovery, which Defendants have almost completely ignored to this day. Pursuant to Your Honor's instructions, Plaintiffs have raised this discovery issue with Magistrate Judge Katz. A copy of the relevant correspondence is enclosed as Exhibit A to this letter.

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March 18, 2008
Page 2 of 3

Plaintiffs have sought time to take discovery on this issue at every opportunity – in their response to Defendants’ pre-motion letter (Exhibit B); in correspondence to Defendants requesting that they temporarily withdraw their motion while Plaintiffs take discovery on the issue (Exhibit C); in their brief in opposition to Defendants’ motion (docket no. 31, pp. 8-9); and in a cross-motion for relief under Rules 12(d) and 56(f) (docket no. 34), which the Court denied as “not in conformity with the Court’s briefing schedule.” Now, with their reply brief (docket no. 42), Defendants have submitted further factual evidence that Plaintiffs have not had an opportunity to rebut.

Plaintiffs demonstrate in their opposition brief (pp. 7-8), that there are material issues of fact that preclude summary judgment in Defendants’ favor. But if the Court disagrees, it would be unfair for the Court to decide the motion in Defendants’ favor while Defendants continue to hide evidence that Plaintiffs need to adequately respond. *See Schering Corp. v. Home Ins. Co.*, 712 F.2d 4, 10 (2d Cir. 1983) (“[S]ummary judgment should not be granted while the party opposing judgment timely seeks discovery of potentially favorable information.”). Therefore, Plaintiffs respectfully request permission to file a motion under Rules 12(d) and 56(f) to deny or continue Defendants’ summary judgment motion to enable Plaintiffs time to obtain affidavits, take depositions, and to undertake other discovery and to give Plaintiffs a reasonable opportunity to present all the material that is pertinent to the motion.

Sur-reply

Plaintiffs request permission to file a 3 page sur-reply to address an argument that Defendants raise for the first time in their reply brief – that Plaintiffs’ class claims should be dismissed because they may have a preclusive effect on individuals’ FLSA claims, (Def. Mem. p. 9 n.4.), which was squarely rejected by the most recent opinion addressing the issue. *See, Guzman v. VLM*, No. 07-CV-1126, 2008 U.S. Dist. LEXIS 15821, at n.12 (S.D.N.Y. March 2,

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2008) (“I fail to grasp the significance of the defendants’ claim that principles of *res judicata* could lead an absent Rule 23 class member’s FLSA claim to be finally resolved even though the plaintiff fails to opt in to the FLSA collective action.”).

Motion to strike

Plaintiffs request permission to file a motion to strike the declaration of John Neilson because Defendants impermissibly attempt to bolster the record on reply by introducing new evidence that they should have raised as part of their moving papers. Defendants had every opportunity to present this declaration the first time around. Plaintiffs put Defendants on notice of their joint employment and integrated enterprise theories in their First Amended Complaint. (Exhibit D, ¶¶ 31). Defendants have no excuse for waiting until now to raise these purported facts to which Plaintiffs have no opportunity to respond. *See Viero v. Bufano*, 925 F. Supp. 1374, 1379-80 (N.D. Ill. 1996) (accepting such evidence would thwart the goal of avoiding “[t]rial by ambush”); *Lundy v. Am. Cyanamid Co.*, 1998 U.S. Dist. LEXIS 23555, at *4 (S.D. Ohio Jan. 22, 1998).

* * *

For the foregoing reasons, Plaintiffs respectfully request permission to file (1) a motion pursuant to Rules 12(d) and 56(f) of the Federal Rules of Civil Procedure; (2) a three page sur-reply in further opposition to Defendants summary judgment motion (docket number 23); and (3) a motion to strike the declaration of John Neilson.

Respectfully Submitted,



Justin M. Swartz

enclosures

cc: Hon. Theodore H. Katz (by Hand Delivery)
Jerrold F. Goldberg, Esq. (by Email)
Richard J. Burch

Motions [18+23] are respectfully
denied and moot in light of counsel's
changes + counterchanges (which also
appear unreasonably litigious).
Conference on 3/21/08 devoted to revised
new schedule, at 9:00 AM

SO ORDERED:

Date: 3/19/08

Richard M. Berman
Richard M. Berman, U.S.D.J.